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No. 83-2061

In the Supreme Court of the United States

OCTOBER TERM, 1984

DRAVO MECHLING, INC., ET AL., PETITIONERS

v.

COMBI LINES AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a person whose negligence causes a vessel that he does not own to sink in navigable waters may be liable for damages arising from a subsequent collision with the vessel.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A35) is reported at 727 F.2d 455. The panel opinion (Pet. App. A36-A56) is reported at 696 F.2d 1141. The opinion of the district court (Pet. App. A57-A71) is reported at 513 F. Supp. 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. A72-A73) was entered on March 19, 1984. The petition for a writ of certiorari was filed on June 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 15 of the Rivers and Harbors Act of 1899 (33 U.S.C. 409) provides in pertinent part:

> It shall not be lawful * * * to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels * * *. And whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

STATEMENT

1. As alleged in the pleadings, a barge owned by respondent Combi Lines (Combi) sank in the Mississippi River in 1974 as a result of petitioners' negligence (Pet. App. A5). The unmarked wreck was struck three years later by the M/V Dauntless Colocotronis (Dauntless) (*id.* at A5-A6). In consolidated actions in the United States District Court for the Eastern District of Louisiana, the owners and operators of the Dauntless sought recovery against petitioners, claiming that the damage to the Dauntless was caused by petitioners' negligence in sinking the Combi barge, and against Combi and the United States, claiming that their negligence in failing to mark or remove the barge caused the accident involving the Dauntless. The United States and Combi filed third-party complaints against

petitioners seeking contribution or indemnity.[1] *Id.* at A6, A26-A27.

2. Petitioners moved for judgment on the pleadings, arguing that Section 15 of the Rivers and Harbors Act of 1899 (33 U.S.C. 409) precludes the imposition of damages liability on a person who negligently causes a vessel that he does not own to sink, when another vessel subsequently collides with the sunken vessel.[2] The district court agreed, ruling that the duty imposed by Section 15 on the owner of a sunken vessel to mark or remove the wreck makes "[t]he preceding breach of duty by the original tortfeasor which led to the sinking of the wreck * * * irrelevant for purposes of determining liability for the later accident" (Pet. App. A63). The United States[3] and Combi appealed pursuant to 28 U.S.C. 1292(a)(3).[4]

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[1] Combi also tendered petitioners as defendants pursuant to Fed. R. Civ. P. 14(c). See note 4, *infra*.

[2] The motion did not seek to dismiss the claims of the United States for the cost of removing the sunken barge (Pet. App. A27 n.12).

[3] The court of appeals (Pet. App. A16) and petitioners (Pet. 5 n.3) properly note that the motion for judgment on the pleadings did not require a determination of whether the United States could be liable to the owners and operators of the Dauntless on the facts of this case, which have not yet been developed (see Pet. App. A28-A29).

[4] The Dauntless interests have voluntarily dismissed their claims against petitioners without prejudice (Pet. App. A26 n.10). The possibility of plaintiffs' recovery directly from petitioners remains, however, because petitioners were tendered by Combi to plaintiffs as defendants under Fed. R. Civ. P. 14(c) (Pet. App. A26-A27 & n.11, A28). See generally 3 *Moore's Federal Practice* para. 14.34 (2d ed. 1984). Petitioners' suggestion (Pet. 12) that their liability to plaintiffs is no longer at issue is therefore incorrect. It is in any event irrelevant to the question presented, which concerns whether petitioners are, as a matter of law, freed of all liability by Section 15. As the court below recognized (Pet. App. A28-A29), this issue does not require a determination at this time of whether petitioners' liability, if any, may flow directly to plaintiffs or instead to Combi and the United States.

3. The court of appeals, sitting en banc, reversed (Pet. App. A1-A29).[5] Citing *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), the court reasoned that Section 15 was not intended to shield from damages liability a person who negligently causes a vessel to sink (Pet. App. A15). The court did not read a line of Second Circuit cases decided before *Wyandotte Transportation* to compel a contrary result (Pet. App. A17). It also noted that general principles of maritime and land-based tort law support the conclusion that whether the failure to mark a wreck is a superseding cause and whether the initial sinking of the vessel is a proximate cause of the later collision with the wreck are questions of fact in each particular case, not questions of law suitable for decision on the pleadings (*id.* at A20-A26, A29 n.14).

ARGUMENT

The court of appeals correctly interpreted Section 15 in light of this Court's decisions in *Wyandotte Transportation Co.* v. *United States, supra*, and *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960). While the decision below arguably is inconsistent with a 50 year-old decision of the Second Circuit, that court has not yet had an opportunity to reconsider its position in light of *Wyandotte Transportation* and *Republic Steel*, and no other court of appeals has decided the issue. Any conflict that may exist is, accordingly, of little practical significance at this time. For these reasons, review by this Court is unwarranted.[6]

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[5]Two judges dissented on grounds similar to those set forth by the district court (Pet. App. A29-A35). A divided panel of the court of appeals had vacated the judgment of the district court (*id.* at A36-A56).

[6]Whatever the merits of petitioners' contentions, they are not yet ripe for review by this Court. The court of appeals reversed the district court's ruling that petitioners are entitled to judgment on the pleadings, and remanded for further proceedings. There has as yet been no determination that petitioners are subject to any liability on the facts of this

1. a. Section 15 by its terms prohibits any person from negligently causing a vessel to sink in navigable waters, whether or not he owns the vessel (see *Wyandotte Transportation,* 389 U.S. at 199 n.11). It also requires that the owner of a sunken vessel mark its location and remove it; a failure to remove the wreck is considered an abandonment permitting the United States to remove it. In *Republic Steel,* the Court concluded (362 U.S. at 492) that appropriate remedies may be implied under the Act to protect the government's interest in maintaining the navigable capacity of the nation's waterways. In *Wyandotte Transportation,* the Court applied this reasoning in rejecting an argument that the express statutory remedies for violation of Section 15's prohibition against negligent sinking preclude all other remedies against a culpable nonowner (389 U.S. at 200-201):

> [O]ur reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others. There is no indication anywhere else — in the legislative history of the Act, in the predecessor statutes, or in nonstatutory law — that Congress might have intended that a party who negligently sinks a vessel should be shielded from personal responsibility. We therefore hold that the remedies and procedures specified by the Act for the enforcement of § 15 were not intended to be exclusive.

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case. See page 7 note 7, *infra.* If petitioners prevail at trial, their contentions will be moot. If, on the other hand, petitioners are held liable for damages, and that determination is affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. For this reason as well, review by this Court is unwarranted.

The Court concluded (389 U.S. at 204) that the government could obtain a declaration that those who negligently sink a vessel, including nonowners (*id.* at 199 n.11), are responsible for removing the wreck, or could recover from them its own cost of removing it. "Denial of such * * * remed[ies]," the Court reasoned (*id.* at 204), "would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim."

b. The decision below is firmly grounded in the teachings of *Wyandotte Transportation* and *Republic Steel.* Section 15 does not explicitly prohibit the imposition of civil liability on a person who negligently sinks a vessel he does not own. Nor can it seriously be contended in light of these precedents that the remedies provided under the Act necessarily preclude such liability. To the contrary, the government's right to recover its own losses from one who causes a vessel to sink may fairly be implied from the Act itself. See *Wyandotte Transportation,* 389 U.S. at 204; *Republic Steel,* 362 U.S. at 492. Moreover, the duties created by Section 15 are not inconsistent with — and so do not implicitly displace — the traditional maritime tort of negligence, which subjects a tortfeasor to liability for his apportioned share of a loss caused by his negligence. See generally *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975); *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 413 & n.6 (1953); *United States* v. *M/V Big Sam,* 681 F.2d 432, 443 (5th Cir. 1982); *Burgess* v. *M/V Tamano,* 564 F.2d 964 (1st Cir. 1977), cert. denied, 435 U.S. 941 (1978).

Imposing liability on the person who negligently sinks a vessel will not, as petitioners suggest (Pet. 12-15), reduce the incentives of the owner to mark and remove the wreck, resulting in a lower level of navigational safety than would

exist in the absence of such liability.[7] Those incentives remain intact, for the owner is not only subject to criminal penalties for violating Section 15, he is also subject to liability for his share of any damage caused by a collision with the wreck. Where he has clearly failed to perform his duties, that share will no doubt usually be substantial. It would be foolhardy indeed for an owner to neglect his statutory duties merely on the chance that his liability for subsequent collisions may be reduced in an unknown amount by damages that might be imposed on the person responsible for the sinking. Furthermore, subjecting negligent persons who sink vessels to a share of liability for resulting losses will serve as a deterrent to the careless conduct that causes sinkings in the first place. This is of course fully in harmony with the Act's safety-related purposes and with its prohibition of intentional and negligent sinkings.

2. In *Red Star Towing & Transportation Co.* v. *Woodburn,* 18 F.2d 77 (2d Cir. 1927), the court held that the owner of a sunken vessel who had not marked the wreck even though he had an opportunity to do so was liable for the full amount of damages sustained by a vessel that struck

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[7]Petitioners also appear to suggest (Pet. 13), by their reliance on language taken from *University of Texas Medical Branch* v. *United States,* 557 F.2d 438, 450 (5th Cir. 1977), cert. denied, 439 U.S. 820 (1978), that it would somehow be unfair to subject them to liability. But the language they quote from that case addresses the applicability of the Limited of Liability Act of 1851, 46 U.S.C. 181 *et seq.*, which depends upon whether an act occurred with the shipowner's "privity or knowledge" (46 U.S.C. 183(a)), not the question of whether any liability at all may be imposed without such knowledge. In any event, there is surely nothing unfair in holding a tortfeasor responsible for losses caused by his own wrongful conduct. See *Wyandotte Transportation,* 389 U.S. at 204. Moreover, the decision below holds only that petitioners are not relieved of liability as a matter of law by Section 15; petitioners remain free to argue in the district court that their negligence was not, on the facts as they may be developed, a proximate cause of the damage to the Dauntless (Pet. App. A29 n.14).

the wreck. Damages were not reduced even though the owner of the damaged vessel also owned the vessel that caused the initial sinking. In reaching this result, the court emphasized that a person who sinks a vessel he does not own has no duty under Section 15 to mark the wreck (18 F.2d at 79). This statement was supported by Second Circuit precedent. See *The Anna M. Fahy,* 153 F. 866, 867 (1907) (person who caused sinking is not liable "for failure to mark the wreck"); *The R.J. Moran,* 299 F. 500, 503 (1924). The court went on to state, without citation of authority, that the sole duty under Section 15 of one who sinks a vessel is to notify its owner, and that therefore "a tug which negligently sinks a vessel is not liable to subsequent craft which may foul the wreck * * * because the second collision is a proximate consequence of the first fault" (18 F.2d at 79). The court may well have based this remark on the facts before it, and concluded that the owner's failure to mark the wreck under the circumstances there presented cut off the chain of proximate causation with respect to the initial sinking. On this reading, *Red Star Towing* does not conflict with the decision below: the question of proximate cause here has not yet been addressed (see Pet. App. A29 n.14).

To the extent that *Red Star Towing* may be interpreted as holding, as a matter of law, that Section 15 precludes the imposition of liability on one who negligently sinks a vessel he does not own even where proximate causation has been established, it is in conflict with the decision below.[8] But the

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[8]None of the other cases relied upon by petitioners (Pet. 5) directly conflicts with the decision below. The other Second Circuit cases, *The Anna M. Fahy, supra, The R.J. Moran, supra,* and *Lowery* v. *The Tug Ellen S. Bouchard,* 128 F. Supp. 16 (N.D.N.Y 1955), aff'd on opinion below, 229 F.2d 436 (1956), all addressed the question of whether liability could flow from a nonowner's failure to mark a wreck, not from his negligence in sinking the vessel. And in the other decision cited by petitioners as in conflict, *American Commercial Barge Line Co.* v.

Second Circuit's view of Section 15 in 1927 as creating the sole corpus of duties relevant to sunken vessels can no longer be regarded as sound in light of this Court's subsequent decisions in *Republic Steel* and *Wyandotte Transportation*, which hold that the remedies provided in the Act are not exclusive (see pages 5-6, *supra*). The holding in *Wyandotte Transportation* that nonowners may be declared responsible for or required to bear the cost of removing vessels sunk through their negligence invalidates the premise of *Red Star Towing*, which was that Section 15 "absolves the [person who has sunk a vessel he does not own] from subsequent consequences" (18 F.2d at 79). It would be premature for this Court to assume that the Second Circuit would now adhere to *Red Star Towing*.

The existence of any meaningful conflict between the circuits is accordingly only speculative at this time. Moreover, the small volume of reported cases on the matter suggests that the issue is not so significant as to require this Court's immediate attention. Finally, the decision below

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Eagle Marine Industries, Inc., 1977 A.M.C. 475 (E.D. Mo. 1976), the court held on the facts before it that the sinking was not a proximate cause of the collision with the wreck because the owners' failure to mark "served to supersede [the initial] negligence" (*id.* at 485). The district court's later quotation (*id.* at 485-486) in dictum of language from *Red Star Towing* hardly warrants review of the decision below. Petitioners' reliance (Pet. 9-10) on *Inland Tugs Co.* v. *Ohio River Co.*, 709 F.2d 1065 (6th Cir. 1983), is also misplaced. The court there held that the owner of a sunken vessel could not delegate his duty to mark the wreck to the United States, and determined that, on the facts presented, the absence of a marking buoy "appears to have been the sole cause of the collision" (709 F.2d at 1072). The court did not question its conclusion in *Ingram Corp.* v. *Ohio River Co.*, 505 F.2d 1364, 1369-1371 (6th Cir. 1974), that the defendant's negligence there in sinking a barge and in failing to mark it proximately caused a collision with the sunken vessel. The court of appeals in the instant case properly relied on *Ingram* (Pet. App. A25-A26 & n.9) in support of its conclusion that the initial negligence involved in sinking a vessel is not irrelevant to a determination of liability for a subsequent collision with the wreck.

reaches an eminently sensible result: Section 15, which prohibits the negligent sinking of vessels, does not exempt a person who negligently sinks a vessel that he does not own from the normal rules governing maritime torts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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